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IN THE
Supreme Court of the United States

W.R. GRACE & CO.—CONN. and CHRYSLER MOTORS CORPORATION,

Petitioners,

v.

WASHINGTON DEPARTMENT OF REVENUE,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

BRIEF OF *AMICUS CURIAE* COMMITTEE ON STATE TAXATION IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* COMMITTEE ON STATE TAXATION IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

This brief is submitted by the Committee On State Taxation (COST) as *amicus curiae* in support of the Petitioners in the above captioned matter.[1] COST is submitting this brief because its members have expressed significant concern over the continued failure, as illustrated by this case, of state taxing authorities and state courts

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Written consents of the Petitioners and Respondent have been obtained and filed with the Clerk of the Court.

to provide constitutionally sufficient remedies to taxpayers for unconstitutional taxes.[2]

COST's objective is to preserve and promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. COST's membership consists of over 500 multistate corporations involved in interstate and international commerce. COST is a non-profit trade association that was organized in 1969 as an advisory committee to the Council of State Chambers of Commerce and was separately incorporated on January 1, 1992. Many of COST's members have business operations in the State of Washington and pay the Washington business and occupation tax. These members have pending refund claims or assessments in Washington awaiting a final determination as to whether Washington's proffered "remedy" meets due process standards. Thus, these members will be directly affected by a decision of this Court to review this case. Further, all of COST's members are involved from time to time in various constitutional challenges to state and local taxes which, when successful, require a remedy. Thus, all of COST's members are affected by the articulation of the requirements for a remedy to meet due process standards and by the states' willingness and ability to comply with these requirements.

As such, COST's members are directly affected by this case and have a strong interest in its outcome.

SUMMARY OF THE ARGUMENT

COST asks this Court to accept this case for review to determine whether a state remedy for an unconstitutional

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[2] COST is submitting a similar brief raising similar issues in support of the Petitioners in *Buffelen Woodworking Co., et al. v. State of Washington, Department of Revenue*, No. 99-38.

tax which retroactively imposes new and unexpected record keeping and proof requirements on the injured taxpayers is either a predeprivation remedy or "*meaningful* backward looking relief" and whether this new and unanticipated remedy imposed up to seven years after the tax was due and in lieu of all statutory remedies previously available is a "clear and certain" remedy. This Court should review this case for two reasons: 1) to prevent Washington, and by implication other states, from ignoring the constitutionally mandated standards for remedies of unconstitutional taxes; and 2) to articulate such a clear and unequivocal definition of what constitutes a sufficient remedy for an unconstitutional tax that both the states and taxpayers can fairly and uniformly apply that standard without significant further controversy.[3]

This Court has already begun the process of defining what constitutes a constitutionally sufficient remedy for an unconstitutional tax. A taxpayer must be given either a predeprivation remedy or "meaningful backward looking

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[3] Washington, in its Counter-Petition arguing that providing relief to the Petitioners would run afoul of the ban on selective prospectivity, oddly asserts that the remedy for its erroneous treatment of some taxpayers is to apply the erroneous treatment to all taxpayers. It is Washington, not this Court, that has prevented the *Tyler Pipe* and similar taxpayers from receiving a remedy. The Washington Department of Revenue originally argued, and the Washington Supreme Court upheld, that this Court's decision in *Tyler Pipe* should be applied prospectively only. *National Can Corp. v. Department of Revenue*, 749 P.2d 1286 (Wash.), *cert. denied*, 48 U.S. 1040 (1988). The result of the Washington Supreme Court's decision in *National Can* was that the *Tyler Pipe* taxpayers did not receive a refund for the taxes declared unconstitutional by this Court. The Supreme Court of Washington subsequently reversed its position and held that *Tyler Pipe* does apply retroactively. *Digital Equip. Co. v. Dep't of Revenue*, 916 P.2d 933 (Wash. 1996). To argue that it should be allowed to perpetuate the mistake it made in *National Can* demonstrates the lengths to which the State will go to retain illegally imposed taxes.

relief," *McKesson Corp. v. Division of Alcoholic Bev. & Tobacco,* 496 U.S. 18 (1990) and the remedy must be "clear and certain," *Atchison, T. & S.F.R. Co. v. O'Conner.* 223 U.S. 280, 285 (1912). The meaning of the key terms of this constitutional standard—"meaningful" and "clear and certain"—must still be articulated. COST proposes that "meaningful" backward looking relief means that the taxpayer's injury is erased. COST further proposes that "clear and certain" means that the taxpayer knew of its available remedies at the time the unconstitutional tax was imposed. These standards are both violated in this case.

ARGUMENT

THE RETROACTIVE CREDIT OFFERED BY THE STATE OF WASHINGTON TO REMEDY AN UNCONSTITUTIONAL TAX VIOLATES THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION BECAUSE THE REMEDY IS NEITHER *MEANINGFUL* NOR *CLEAR AND CERTAIN.*

It is not hyperbole to state that the issue of remedies for unconstitutional taxes is the single most important issue in state and local tax today. States continue to impose unconstitutional taxes and when a court ultimately invalidates these taxes, many states nevertheless refuse to provide the taxpayer with constitutionally sufficient relief. This situation is a source of significant frustration[4] to

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[4] The lack of adequate remedies has become somewhat of a depressing joke at taxpayer gatherings. Some taxpayers, after years of ultimately successful litigation challenging a tax have taken to cynically waving a dollar bill in the air and commenting that they have not received even one dollar in refunds from the suit. This is a sad commentary on the current system.

taxpayers and this Court is the only forum in which a solution is available.

History of the Unconstitutional Tax to be Remedied

Washington imposes a business and occupation tax ("B&O" tax) on companies manufacturing items in the state and a separate B&O tax on companies selling items in the state. However, under Washington's original system, a company both manufactured and sold items in the state, it paid only the manufacturing tax (and was exempt from the selling tax). This system was ruled unconstitutional under the Commerce Clause in 1948 because it discriminated against companies who manufactured items in other states but sold the items in Washington. *Columbia Steel Co. v. State*, 192 P.2d 976 (Wash. 1948). The tax was unconstitutional because local manufacturers were exempt from the selling tax but out-of-state manufacturers were not.

Faced with an unconstitutional tax, Washington merely reversed the exemption rules. Under the new system, companies that sold items in the state were exempt from the manufacturing tax on items they manufactured and sold in the state. Wash. Rev. Code § 82.04.440(2). Companies who only manufactured items in the state but sold them in other states, continued to be subject to tax on their manufacturing activities.

In 1987, this Court ruled this second tax scheme unconstitutional for the same reason that the first scheme was invalidated. *Tyler Pipe Industries, Inc. v. State Dep't of Revenue*, 483 U.S. 232 (1987). As before, the new tax system discriminated against taxpayers who performed only one activity in Washington. *Id.* at 253.

Washington, still unwilling to overhaul its tax system, instead tacked on a credit mechanism in an attempt to make its B&O tax constitutionally acceptable. Wash. Rev.

Code § 82.04.440. Under the new credit provision, if a company paid a B&O tax on either manufacturing or selling in a state other than Washington, it could receive a credit against its Washington tax for the other activity—if the other state's tax was substantially identical to Washington's tax and was imposed on the same goods that were also subjected to Washington's tax. Essentially, the credit mechanism is hollow since the income, franchise, and sales taxes that most states impose on manufacturers are disqualified from Washington's credit. The legislation creating the credit was effective August 12, 1987. 1987 Wash. Laws, 2d Ex. Sess., ch. 3 § 2. Washington applied this credit system retroactively, asserting that the credit was the only remedy for tax declared unconstitutional in 1987. It is this retroactive and exclusive imposition of the credit that is at issue here.

Standards for Determining a Constitutional Remedy

A remedy to a tax declared unconstitutional must comply with the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[5] *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 100 (1992). Under the Due Process Clause, a remedy is constitutional only if it meets two tests: 1) the state must provide either a predeprivation remedy or "meaningful backward looking relief." *id.*; and 2) the remedy must be "clear and certain." *Atchison, T. & S.F.R. Co.*, 223 U.S. at 285. The remedy at issue here, ostensible credits imposing additional substantive and procedural requirements years after the tax in question was incurred, meets neither of these requirements.

The credit does not provide an adequate predeprivation remedy or "meaningful backward looking relief" because

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[5] [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . . U.S. Const. amend. XIV, § 1.

the record keeping requirements and the narrow interpretation of a tax qualifying for the credit make the credit an illusion rather than a real remedy. The Taxpayers' Petition for Writ of Certiorari ("Taxpayers' Petition") fully discusses the issue (Buffelen Brief pp. 12-17, Grace/Chrysler Brief pp. 8-16), and COST will not repeat the explanation other than to support the Taxpayers' position and to emphasize the importance of this issue to the taxpaying community.

Taxpayers should not be expected to anticipate all of the possible remedies a tax authority might create after the tax authority has lost the battle to legitimatize an unconstitutional tax. Record keeping, like that required in this case, is a very expensive and time consuming process, and is unnecessary for any business purpose of most companies. This case, whether accepted by this Court or not, sets the standard for taxpayer expectations. If this case is not accepted and reversed, then the "anything goes" attitude of the Washington Department of Renevue will be the standard. At best, taxpayers will be forced to choose between anticipating all of the possible remedies years before the constitutionality of a tax is finally decided (including preparing records and conforming business activities to comply with all possible future scenarios) or deciding to give up on a possible remedy because the cost of anticipatory preparation is too high. Realistically, a taxpayer will never be able to anticipate *all* possible remedies a state could devise and, thus, will frequently be left without any recourse. None of these alternatives supports a fair and equitable tax system governed by the standards of due process. Accordingly, Washington's determination of what constitutes a constitutional remedy should be reviewed and reversed.

The credit also does not provide a "clear and certain" remedy because the credit was not available at the time

the tax was incurred and retroactively replaces remedies that were and, according to Washington's statutes, are still provided by statute to the taxpayers. *McKesson Corp.*, 496 U.S. at 39 n.22 (1990). To be "clear and certain," a remedy must, at a minimum be a remedy that the taxpayer was aware of at the time it chose to protest the tax. The terms "clear and certain" indicate that the remedies are specifically defined and guaranteed. Absent such simple notice a remedy cannot be clear and certain.[6] Washington's credit system runs afoul of this standard, and thus for this reason also, Washington's decision should be reviewed and reversed.

Finally, the remedy provided by Washington actually violates one of the clear standards already articulated by this Court—a state may not "bait and switch" in applying a remedy. *Reich v. Collins*, 513 U.S. 106 (1994). In *Reich v. Collins*, the taxpayer challenged the constitutionality of a state tax under a statutory refund provision. *Id.* The state tax code provided for both predeprivation challenges (protests) and post-deprivation challenges (refund suits). After the tax was ruled unconstitutional, the state tried to avoid paying the refund by arguing that since the taxpayer could have challenged the tax before paying the tax, the taxpayer had paid the tax voluntarily and no refund was due. *Id.* at 110. This Court soundly rejected this argument. *Id.* at 111. "Bait and switch" in the consumer protection world occurs when a company advertises a product, such as a television, for a very low price in order to entice a customer to enter the store. Once in the store, the customer is told that the store does not have that product but is offered a similar

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[6] COST is in no way suggesting that states could not offer a constitutionally adequate credit as a remedy, rather than a refund, but only suggests that this remedy must be apparent at the time the tax was protested by the taxpayer.

but different product for a more expensive price. Frequently, because the customer is already at the store and is prepared to make a purchase, the customer will buy the substitute and the store will make a higher profit than it would have made on the advertised product. This is just what Washington did here: it offered injunctive and refund relief for illegal taxes (Wash. Rev. Code §§ 82.32.150; 82.32.180), but when the taxpayers came to court to obtain the advertised remedy, the state said, "we won't provide the statutory relief, but what we can offer you are these new, costly credits." The Petitioners came to court expecting refunds and injunctive relief for the unconstitutional tax; the refunds and injunctive relief were authorized by statute; and the credit statute did not exist at the time the Petitioners filed their claims for relief. Therefore, the Petitioners are owed the statutory relief originally provided.

Procedural Reason for Accepting the Case for Review

An unequivocal definition of the requirements of a constitutional remedy for an unconstitutional tax and a mandate to the states to provide this relief is also necessary because of the limited forums available to a taxpayer to pursue its remedies. A taxpayer generally cannot challenge the constitutionality of a state or local tax in the lower federal courts. U.S. Const. amend. XI; 28 U.S.C. § 1341. The Eleventh Amendment[7] prohibits suits for monetary damages against a state in federal court and thus prevents all suits for state tax refunds. *Ford Motor Co. v. Dep't of Treasury of Indiana*, 323 U.S. 459, 462 (1945). The Tax Injunction Act, as interpreted, prohibits taxpayers from bringing any action in federal court if

[7] "[J]udicial power . . . shall not . . . extend to any suit . . . commenced or prosecuted against one of the United States Citizens." U.S. Const. amend. XI.

there is a "plain, speedy, or efficient" remedy at state law, *Newsweek, Inc. v. Florida Dep't of Revenue*, 522 U.S. 442, 444 (1998). Most of the cases interpreting the Tax Injunction Act have determined that state refund or protest systems are plain, speedy and efficient and thus jurisdiction in the federal courts is generally prohibited. *See, e.g., id.; California v. Grace Brethren Church*, 457 U.S. 393 (1982). While this Court has accepted several state tax cases in each of its terms in recent memory, review by this Court is anything but guaranteed. Thus, taxpayers are usually limited to a state court as the final arbiter of what is an adequate remedy. In order to ensure that these state courts provide a constitutionally sufficient remedy, COST respectfully requests this Court to accept this case for review.

Finally, the constitutionality of a retroactive remedy imposed in lieu of statutory remedies which requires new, burdensome, and unexpected record keeping and proof requirements needs to be addressed by this Court because state courts addressing similar remedies for similar taxes have reached contrary results. In the case at bar, the Washington Supreme Court approved of the retroactive application of the credit as the sole remedy for the unconstitutional tax. In *General Motors Corp. v. City and Cty. of San Francisco*, 69 Cal. App. 4th 448 (1999),[8] the California Court of Appeal came to the opposite conclusion and mandated full refunds rather than the taxing authority's proffered conditional, partial refunds. Thus, Washington and California courts have adopted different

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[8] Like *Tyler Pipe*, the tax at issue in *General Motors* was also a tax on manufacturing and selling activities with the local manufacturers exempt from the selling tax. Once the tax was declared unconstitutional, the City in *General Motors*, like Washington here, provided no refund or assessment abatements but instead offered a retroactive partial refund if the taxpayer met certain record-keeping requirements and proved payment of other taxes.

standards for what constitutes a constitutional remedy and this difference can be reconciled only in this Court.

CONCLUSION

For the reasons stated above, and because taxpayers throughout the country have a significant concern over the current refusal by states to provide truly meaningful, clear and certain remedies for unconstitutional taxes, COST respectfully requests the Court to accept this case for review.

Respectfully submitted,

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